



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-4249

Re: Application of Chain Store
Tax to stores operated by
a natural gas company.

This is in answer to your request for an opinion dated
November 25, 1941, in which you request answers to the following
questions:

"Query One. Can a store in a town of less than
3,000 population which is now exempt from the chain
store tax under Article 7060 as amended, and which is
engaged in selling natural gas appliances as incident-
al to its utility business, dispose of appliances
other than those using natural gas in those cases
where such other appliances have been acquired through
trade-ins on the new gas appliances?

"(a) Can it dispose of such trade-in appliances
if they are:

- "(1) Used electrical appliances;
- "(2) Oil burners;
- "(3) Coal burners;
- "(4) Ice Box Refrigerators?

"Query Two. If it be held that the company 'store'
in said towns of less than 3,000 cannot sell any of the
above mentioned trade-in appliances without becoming
subject to the tax under Article 1111d (P.C.), then for
which tax would said 'store' or 'stores' be liable -
the classification under Section 5 or the classifica-
tion under Section 5a?

"Query Three. Suppose it be held that the company
stores in such small towns would be liable for the chain
store tax if they sold any or all of the above type

trade-in appliances, could they legitimately dispose of such trade-in appliances by merely transferring them to towns of more than 3,000 population where the company is already paying the chain store tax on such stores?

"Query Four. Assuming that this would be a legitimate way of disposing of such trade-in appliances, then would such stores in towns of more than 3,000 population which are already paying the chain store tax under Section 5a of Article 1111d (P.C.) be liable to pay a duplicate tax under Section 5 by reason of its disposition of trade-in commodities which are neither gas or electrical appliances but are appliances such as ice box refrigerators, oil, coal or kerosene burners?"

The pertinent part of Article 7060 as amended, Acts 1941, 47th Legislature, House Bill No. 8, Article V, Section 1, reads as follows:

"And provided further that utilities paying an occupation tax under this Article shall not hereafter be required to pay the license fee imposed in Article 5a, House Bill No. 18, Chapter 400, Acts of Forty-fourth Legislature, for the privilege of selling gas and electric appliances and parts for the repairs thereof, in towns of three thousand (3,000) or less in population according to the Next preceding Federal Census."

Query One. Assuming that the store is located in a town of less than 3,000 population, is exempt from the chain store tax under Article 7060, as amended, and is engaged in the selling of natural gas appliances, as incidental to its utility business, and, accepts trade-in appliances as a part of the sale price of its natural gas appliances, it is our opinion that such store is entitled to sell such trade-in appliances without subjecting itself to the chain store tax.

The acceptance of such trade-in appliances, as part payment of the sale price of the new appliances, is a part of the consideration for the sale and is only an incident of the business of the seller. He is equally authorized to convert such trade-in

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appliance into cash as he would be to sell for cash in the first instance, so long and only so long as the acceptance and sale of such trade-in appliances, is only incidental to his primary business of furnishing natural gas and selling natural gas appliances.

Our Supreme Court has said:

"The same person or corporation may carry on several different businesses, and, of course, may be taxed in respect of each; but when the Legislature has defined and taxed one business, it is not to be assumed that it has intended to again tax the same business under another name, nor is it to be assumed that it has intended to tax, as a distinct business, which is a mere incident of another business that which has been defined and taxed as a whole." Texas Co. vs. Stephens, 100 Tex. 628; 103 S. W. 481.

The facts outlined in your inquiry indicate that the seller engages in the selling of the merchandise inquired about only incidentally and occasionally for the purpose of converting the sale price of his new merchandise into cash. Such selling being incidental to his main business and he having already paid an occupation tax for the privilege of conducting that business, we are of the opinion and hold that he does not by such selling of trade-in merchandise subject himself to the chain store tax.

In reaching this conclusion, we are not unmindful of the decision in the case of Standard Oil Co. of Texas vs. State, 142 S. W. 519, in which writ of error was refused, wherein the court held that even though defendant was engaged, primarily, in storing, selling or distributing petroleum products and servicing of motor vehicles, in order to come within the exemption of Section 5 it must be engaged exclusively in such business. That case, however, presents a vastly different fact situation from the matter here under discussion. There, the seller was engaged in one type of business obviously within the exemption. It was also engaged in another and entirely different business not within the exemption. Here our seller is engaged in the business of selling appliances and parts obviously within the exemption provided in Article 7060. In making his sales he sometimes takes trade-in merchandise not within the exemption. He has the privilege of selling, for which privilege he has paid.

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It follows that he has the privilege to collect the sale price - to reap the benefits of his sales. In order to do so he must convert his trade-in merchandise into cash. He can only do that by selling those trade-ins. He deals in such merchandise only as an incident to his business. We think such sales are authorized.

Having thus answered your first question, it becomes unnecessary to answer your other questions.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED ~~WAS~~ 1942
George H. Sheppard

VICE ATTORNEY GENERAL
ATTORNEY GENERAL

By *Fowler Roberts*

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